MASS. EA, 36.2: M38 /992

UMASS/AMHERST

312066016456023

Massachusetts Wetlands and Waterways

A General Guide to the Massachusetts Regulatory Programs

Division of Wetlands and Waterways
Department of Environmental Protection
Executive Office of Environmental Affairs
Commonwealth of Massachusetts
April 1992

TABLE OF CONTENTS

Introduction to Wetlands and Waterways Regulatory Programs	1
Wetlands Protection Program	4
Wetlands Conservancy Program	12
Waterways Regulation Program	15
Division Support Units	21
Related Federal, State and Local Programs	22
Addresses and Contacts	24

WETLANDS AND WATERWAYS REGULATORY PROGRAMS

Coastal and inland wetlands, floodplains, tidelands, great ponds, and waterways are valuable natural resources that are protected by state laws. These laws govern the way these natural resources may be used, including the type of work which may be performed in them.

This booklet is designed to give an overview of the Commonwealth's programs for protecting these resources as well as information about their regulatory processes. While an effort has been made to provide basic information, this booklet does not contain all the details of each program's operation. Please refer to the specific laws and regulations for more information about the programs.

Protected Resources

Coastal wetlands are areas associated with the seacoast that are subject to tidal action or coastal storm flowage. There are 11 resource areas within the category called coastal wetlands. Some of the more familiar are salt marshes, coastal beaches, and dunes. Coastal wetlands are protected because they contribute to public health and safety. Some of these important functions include:

-- providing a critical buffer between land and sea by absorbing the energy of tidal action, wave action, and storm surges;

-- supporting habitats for many animal and plant species;

-- producing a tremendous amount of organic matter which enters the food chain;

-- serving as vital spawning, feeding, and nursery grounds for species important to sport and commercial fisheries; and

-- providing access to the ocean for water-dependent coastal marine activities.

Inland wetlands generally are low-lying areas which include four resource types: bordering vegetated wetlands, land subject to flooding (bordering and isolated), land under water bodies and waterways, and banks. These resource areas are protected because they perform valuable functions including:

-- protection of water supplies;

-- prevention of storm damage;

-- prevention of pollution; and

-- habitat support for many plant and animal species.

Floodplains are low-lying areas that flood when water levels rise in a bordering waterway or water body. In the regulations, floodplains are considered a specific inland wetland resource area called land subject to flooding. They are regulated primarily for their value related to flood control and storm damage prevention.

Tidelands are present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction (three miles). Tidelands include both flowed and filled tidelands.

Private tidelands are those lying landward of the historic low water mark or 1,650 feet seaward of the historic high water mark, whichever is farther landward. In private tidelands the public has rights to fish, fowl, and navigate.

Commonwealth tidelands are those lying seaward of the historic low water mark or 1,650 feet seaward of the historic high water mark, whichever is farther landward, out to the state's three-mile jurisdiction limit. Tidelands are traditionally held by the state for the benefit of the public. However, Commonwealth tidelands are actually owned by the state and held in trust for all citizens. Public rights in Commonwealth tidelands include public access and the right to engage in water-related recreational activities, in addition to navigation, maritime commerce, fishing, and fowling.

The *submerged lands under great ponds* and *certain watercourses* are regulated similarly to tidelands to protect the public interest in navigation and other reserved public rights.

State Programs for Resource Protection

The protection of the natural resources described above is primarily the responsibility of the state's Department of Environmental Protection (DEP), a department within the Executive Office of Environmental Affairs. Within DEP, the Division of Wetlands and Waterways (the Division) implements the laws and regulations. The Division is part of the Bureau of Resource Protection.

There are two regulatory programs within the Division: the Wetlands Protection Program and the Waterways Regulation Program. The Division's third program, the Wetlands Conservancy Program, has a regulatory component but essentially is a resource mapping and analysis program. Several units support the Division's programmatic efforts: the Technical Support Unit, the Education and Training Unit and Program Coordination Unit. These programs and units will be described in the following pages.

The Wetlands Protection Program

The Wetlands Protection Program administers the Wetlands Protection Act. The Wetlands Protection Act (Massachusetts General Laws (MGL) Chapter 131, section 40) protects public interests in both inland and coastal wetland resource areas. These public interests are protected by prohibiting the removal, dredging, filling, or altering of wetlands without a permit.

In the 1960s, Massachusetts passed the nation's first wetlands protection laws, the "Jones Act" and the "Hatch Act". In 1972, these laws were combined to create what is now the Wetlands Protection Act (MGL c.131, §40).

Comprehensive regulations were enacted in 1978 for coastal wetlands and in 1983 for inland wetlands (310 Code of Massachusetts Regulations (CMR) 10.00 et seq).

The Wetlands Conservancy Program

The Wetlands Conservancy Program is largely a non-regulatory mapping program supporting resource analysis and policy decision-making on the state level, as well as supplying vital resource planning and protection information to Massachusetts communities. The program is producing statewide medium-scale

maps with photointerpreted wetlands delineations on them.

A regulatory component of the Conservancy Program, implemented under the Inland and Coastal Wetlands Restriction Acts (MGL c.131, §40A, and MGL c.130, §105), administers restriction orders placed on selected wetlands in the state. The regulations for this aspect of the Conservancy Program are found at 302 CMR 6.00 (inland) and 302 CMR 4.00 (coastal).

The Waterways Regulation Program

The Waterways Regulation Program implements Chapter 91 of the Massachusetts General Laws, the Public Waterfront Act. Chapter 91 preserves, protects, and promotes public rights in tidelands, former tidelands, great ponds, and certain rivers and streams by regulating activities in them, such as construction, dredging, and filling. These rights include public access, fishing, fowling, and navigation.

Enacted in 1866, Chapter 91 is the oldest waterways regulation in the nation. Amendments to the statute in 1983 added important new substantive and procedural requirements in order to ensure that tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.

The state's authority to protect the public interest in tidelands is based on a body of law known as the public trust doctrine, which comes to us from Roman and English law. This doctrine says that the public has fundamental rights and interests in natural resources, including the sea and shore. As trustee of the public interest, the state has a duty to preserve and protect these natural resources and the public's right to use them.

The regulations for Chapter 91 are found at 310 CMR 9.00 et seq. Recent amendments to Chapter 91 regulations have reaffirmed the public interest in present and former tidelands and increased the protection of public rights in waterways.

In the following sections, the Division's programs and support units are described in more detail. Information is provided about jurisdiction, public interests, review standards, and regulatory procedures. Commonly-asked questions with answers from DEP address key issues in each program.

A section of this guide highlights other laws as well as other state, federal, and local agencies concerned with wetlands and waterways protection and regulation. Contact information for programs related to the protection of inland and coastal wetlands, floodplains, and waterways in the Commonwealth is provided at the end of the guide.

THE WETLANDS PROTECTION PROGRAM

The Wetlands Protection Program protects inland and coastal wetlands and preserves their value as natural resources. Detailed regulations (310 CMR 10.00) have been adopted to implement the Wetlands Protection Act. The jurisdiction of the Act extends to the following resource areas:

(a) any bank, any freshwater wetland, any beach, any dune, any flat, any marsh or any swamp bordering on the ocean, any estuary, any river, any stream, any pond or any lake

(b) land under any of the water bodies listed above;
(c) land subject to tidal action;
(d) land subject to coastal storm flowage; and
(e) land subject to flooding.

The Act's jurisdiction also extends to any work within a 100-foot buffer zone adjacent to the resource areas listed in (a) above.

The Wetlands Protection Program is administered at the local level by a Conservation Commission. The Commission is a volunteer board of three to seven members appointed by the community's executive authority. The regulations require that a permit called an Order of Conditions be obtained from the local Conservation Commission before any removing, dredging, filling, or other altering of wetlands can take place. This case-by-case permit review process is triggered by an application to perform work known as a Notice of Intent (NOI).

The application is reviewed to determine the project's impact, if any, on the affected wetland resource area. Work is permitted to go forward only when it can be done in a manner which does not harm the resource involved.

The applicant may file a Request for Determination of Applicability (RFDA) prior to filing a Notice of Intent to determine if an area is in jurisdiction or the proposed work will affect a resource area. In response to the RFDA, the Commission will hold a public meeting to discuss the request and also may visit the site.

If the Commission decides the area is not in the jurisdiction of the Wetlands Protection Act or that proposed work will not affect the resource area (a negative determination of applicability), the applicant may proceed with the project described in the RFDA. However, if the Commission decides the proposed work will affect the resource area (a positive determination of applicability), the applicant must file a Notice of Intent.

In response to the NOI filing, the Conservation Commission conducts a public hearing. Following the public hearing, the Commission issues an Order of Conditions, which either approves the project, denies the project, or approves the project with conditions. These conditions are designed to protect the resource area(s) involved. Decisions made by Conservation Commissions may be appealed to DEP.

The Wetlands Protection Act presumes that wetlands are significant to one or more of the following eight interests: flood control, storm damage prevention, protection of public and private water supply, protection of groundwater supply, prevention of pollution, protection of fisheries, protection of land containing shellfish, and protection of wildlife habitat.

The regulations provide information about these presumptions as they apply to each resource area. The regulations also contain performance standards outlining the type and extent of work allowed in each resource area. This information guides project proponents as well as local Conservation Commissions in applying the Act to specific projects.

The application of various performance standards linked to specific resource areas preserves environmental resources while limiting the Act's jurisdiction. In other words, it prevents overly broad and unnecessary regulation of development in areas where no protected interest is threatened.

For instance, in most cases filling will not be allowed in bordering vegetated wetlands since they are presumed significant to many protected interests and cannot easily be replicated. On the other hand, filling can occur in floodplains when adequate compensatory flood storage is provided since this is the primary protected interest related to floodplains and it can be satisfactorily reproduced.

The Wetlands Protection Program's regulatory process is described in more detail in the following questions and answers.

1

Q What is the purpose of the Wetlands Protection Act?

A The Wetlands Protection Act is designed to protect eight public interests served by wetlands. They are flood control, storm damage prevention, protection of public and private water supply, protection of groundwater supply, prevention of pollution, protection of fisheries, protection of land containing shellfish, and protection of wildlife habitat.

2

Q How does the law operate?

A The law regulates any activity which would remove, fill, dredge, or otherwise alter any resource area. Such activities require a permit called an Order of Conditions specifying what work, if any, may be done and the way in which it may be done. These Orders of Conditions are issued by the local Conservation Commission or, on appeal, by DEP.

3

Q What are the regulations and how are they organized?

A Detailed regulations have been adopted to implement the Wetlands Protection Act. They are found at 310 Code of Massachusetts Regulations (CMR) 10.00. They are organized into three parts. Part I contains procedures relevant to both coastal and inland wetlands. Part II contains substantive rules for coastal wetlands and Part III contains substantive rules for inland wetlands. To obtain a copy of these regulations see the Addresses and Contacts section at the end of this guide.

4

Q What are some examples of the benefits of wetlands as they relate to the public interests in the Act?

A Here are three examples of the value of wetland areas:

(a) Salt marshes provide feeding, spawning, and nursery habitats for many species of finfish and shellfish. The organic matter produced in salt marshes also is exported by tidal action to coastal waters where it serves as food for many marine organisms. These activities support the commercial and recreational fishing industries which contribute to the economy in many regions of the state.

(b) Lands subject to flooding provide a temporary storage area for flood waters. These waters are both retained (slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by floodplains. When wetlands and floodplains are filled and the flood storage capacity is lost, property, homes, and businesses downstream which never were flooded before may be flooded.

(c) Wetlands help prevent or reduce pollution because the plant communities, soils, and associated low, flat topography remove or detain sediments, nutrients, and toxic substances that occur in run-off and flood waters. They may retain them for years or in some cases hold them during the growing season and release them in the fall and winter when such impacts are less likely to reduce water quality.

5

Q Why should smaller projects that affect only limited amounts of wetland area be regulated?

A Even small losses of wetlands, which by themselves may seem inconsequential, result in serious damage to the environment when added together. According to a federal study, overone-third of the Commonwealth's wetlands have been lost to date and many other areas are severely degraded.

6

Q What kinds of land are affected by the Wetlands Protection Act?

A The Act applies to four types of areas:

a) any "bank, freshwater wetland, coastal wetland, beach, dune, flat, marsh, meadow, or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake;"
b) the 100-foot buffer zone of any resource area listed in (a) above;
c) any land under any of the water bodies listed in (a) above;
d) land subject to tidal action, coastal storm flowage, or flooding.

7

Q Are there any more specific guidelines to describe property subject to regulation?

A The regulations break down the areas listed above into categories called resource areas which are separately and individually defined and regulated. There are four inland and 11 coastal resource areas. The inland areas are bordering vegetated wetlands, land under waterways or water bodies, banks, and land subject to flooding (bordering and isolated). The coastal areas are coastal beaches, coastal dunes, salt marshes, barrier beaches, land under salt ponds, rocky intertidal shores, land under the ocean, designated port areas, coastal banks, land containing shellfish, and banks of or land under the ocean, ponds, streams, rivers, lakes or creeks that underlie an anadromous or catadromous fish runs.

8

Q What is the Buffer Zone?

A The Buffer Zone extends 100 feet horizontally from every wetland resource

area except land subject to flooding, land under water, and land subject to coastal storm flowage. It is a zone in which jurisdiction may be applied in the limited instances where the activity proposed will alter the adjacent resource area.

9

Q Are areas outside the resource areas and the Buffer Zone regulated?
A Areas and activities outside the buffer zone and the resource areas are not regulated unless and until an activity actually alters a resource area.

10

Q Is each resource area regulated in exactly the same way?
A The regulations are tailored to each type of resource area and the specific wetland interests that are related to it. Performance standards corresponding to each resource area describe the type and extent of work that can be performed in a specific area. These performance standards guide the regulator and the project proponent in planning and reviewing proposed work.

11

Q How does the applicant know which of the statutory interests are related to their wetland?
A The regulations define which of the eight statutory interests are presumed to be significant for each resource area. The presumptions in the regulations are binding unless one can refute them.

12

Q What activities are regulated under the Act?
A Any activity proposed or undertaken which will remove, fill, dredge, or alter the resource area is subject to regulation. Typical activities include filling, clearing land, removing muck or peat, dumping, excavating, erecting a building, constructing or paving a parking area or roadway, installing drainage ditches or culverts, constructing groins or jetties, installing a dock or pier, and dredging.

13

Q What triggers the Act?
A The Act is triggered when work is proposed that would remove, fill, dredge, or alter a resource area or buffer zone.

14

Q How can an applicant find out if an activity or an area is regulated?
A A Request for Determination of Applicability (RFDA) may be filed with the local Conservation Commission. The Commission will determine if the proposed activity is one which is regulated by the Act and if the proposed location is subject to the jurisdiction of the Act.

15

Q What happens after the RFDA is received?
A After receiving an RFDA, the Conservation Commission is required to make a Determination of Applicability of the Wetlands Protection Act within 21 days, and notify the person making the request, the landowner, and DEP. This determination must be voted on at a properly advertised public meeting.

16
Q If the Conservation Commission does not respond to the RFDA, can the applicant start work?
A No. However, the applicant may appeal to DEP to make a Determination. Specific information relating to appeals and responsibilities is in Part I under the procedures section (310 CMR 10.05) of the regulations.

17
Q Are there other reasons to file an RFDA?
A An RFDA must be filed if work is proposed in a Buffer Zone (unless the applicant plans to file a Notice of Intent, which will be described later). The RFDA may be used to find out if an activity is exempt under the Act. Certain activities related to agriculture, mosquito control, and most maintenance of existing utilities are exempt. The Act further defines exempted activities. An RFDA also may be filed to determine whether the proposed work will alter the resource area and therefore require a permit application, a Notice of Intent.

18
Q What if the applicant thinks the Conservation Commission has issued an incorrect Determination?
A Upon receipt of the Determination the applicant has 10 working days to appeal to DEP for a superseding determination.

19
Q Does the applicant always need to go through the Determination of Applicability process?
A If it is clear that an activity is regulated, there is no need to file an RFDA and the applicant may file the Notice of Intent (NOI) described below.

20
Q What does the applicant need to do if they wish to proceed with a regulated project?
A The applicant must file a Notice of Intent (NOI) with the local Conservation Commission and DEP.

21
Q Are there any fees associated with the Wetlands Protection Act permitting process?
A There are no fees to file an RFDA. However, there are fees associated with the NOI and appeal procedures. These fees vary according to the project. Part of the fee goes directly to the community in which work is proposed. The remainder goes to the Commonwealth of Massachusetts. The fees defray the cost of administering the wetlands laws.

22
Q What does an NOI require?
A The NOI requires the applicant to properly plan the proposed activity so that it does not harm any of the eight statutory interests. The NOI also requires that:

-- all resource areas at the proposed site are identified and shown on a plan; and
-- the proposed activity is designed to meet the performance standards of the regulations;
-- or show that the presumptions of significance are overcome.

Detailed documents, plans, and calculations must be presentedto support the claims made.

23

Q What happens after the NOI is submitted?

A After the NOI is submitted, the DEP regional office assigns a file number to the case and forwards the number to the applicant and the Conservation Commission. Within 21 days of receiving the Notice, the Commission is required to hold a public hearing. At least five days advance notice of the hearing must be given in a local newspaper notice, which is paid for by the applicant. The Commissionalso may schedule a visit to the proposed work site.

24

Q What happens at a public hearing?

A The public hearing is held to allow the Conservation Commission to gather data from the public and to allow the public to comment on the proposal. Any interested person, as well as the applicant, may present information or seek information at the hearing. Typically the applicant describes the proposed activity and how this activity will meet the performance standards. Issues relative to the interests of the Act may be discussed at the hearing. If the presumptions of significance have been challenged, the Conservation Commission must determine whether they have been overcome by the close of the hearing. An official record of the hearing is kept.

25

Q What happens after the public hearing?

A Within 21 days of the close of the public hearing, the Commission issues an Order of Conditions. If the Commission finds that the plans clearly show that the performance standards have been met, then an Order referencing these plans is issued. If the Commission finds that specific performance standards were not met, then conditions are issued which will cause the standards to be met. If the Commission finds that the performance standards have not been met and no conditions could be written to meet the performance standards, a denial is issued.

26

Q If a Conservation Commission does not hold a hearing or issue an Order of Conditions within the time limits, may the applicant proceed with the project?

A No. However, the applicant can appeal to the DEP regional office for a decision.

27

Q After an applicant receives an Order of Conditions which is satisfactory to them, are they allowed to start work immediately?

A The applicant must wait for an appeal period of 10 working days before they start work. The law allows certain parties who object to the terms of an Order to appeal directly to the regional office of DEP to overrule the Conservation Commission's Order. A person making such an appeal must mail it to the DEP regional office within 10 working days from the date of the issuance of the Order of Conditions, and, at the same time, mail copies to the applicant and the Conservation Commission. All these mailings must be sent by certified mail or hand delivery. If no such appeal has been mailed within 10 working days, the applicant should consider the Order to be final and proceed with work.

However, it is a good idea for an applicant to wait a few extra days to allow reasonable time for any delayed mail delivery. It also is advisable

for the applicant to contact the DEP regional office and/or the Conservation Commission to make sure that they have not received an appeal.

28
Q Is there anything else that must be done before work starts?
A Prior to proceeding with work, the applicant must record a copy of the Order of Conditions at the Registry of Deeds in the county where the land is located. There is a recording fee and details may be obtained from the Registry of Deeds. The last page of an Order of Conditions contains a form on which the applicant should place the Registry recording information (book and page or document numbers). This information must be forwarded to the issuer of the Order of Conditions.

29
Q What if an appeal has been filed within 10 days of the Order?
A The applicant may not proceed with work until the appeal has been finally settled.

30
Q What if the applicant is dissatisfied with the Order of Conditions?
A The applicant may request the DEP regional office to review the action of the Conservation Commission and issue a Superseding Order of Conditions. The appeal must be sent to the DEP regional office with a copy to the Conservation Commission within 10 working days of the date of the issuance of the Order (all by certified mail or hand delivery). The applicant may not begin any work until after the appeal is finally settled.

31
Q What happens after an appeal is filed?
A The DEP regional office reviews the file, conducts a site visit, and issues a Superseding Order of Conditions.

32
Q What does the Superseding Order do?
A The Superseding Order can either uphold the Conservation Commission's Order, modify portions of it, or overrule it. If the Superseding Order is not appealed within 10 working days of its mailing date, it becomes the final Order.

33
Q May DEP's Superseding Order be appealed?
A Yes. An adjudicatory hearing will be scheduled in response to an appeal of a Superseding Order. An adjudicatory hearing is a legal proceeding to determine the parties' rights under the law. Expert testimony frequently is necessary, as well as the assistance of a lawyer. An independent Administrative Law Judge oversees this process.

34
Q May DEP's adjudicatory hearing decision be appealed?
A DEP's adjudicatory hearing decision can be appealed to the Superior Court within 30 days of its issuance. A Court decision might take months or years. Such appeals are costly and uncommon.

35
Q After an applicant has a final Order of Conditions for a project, how much time do they have to finish the work?
A Generally, the Order of Conditions is good for three years. Under special circumstances, the Order may specify a longer time period not to exceed

five years.

36
Q If the applicant is unable to complete the work within the specified time period, may they request an extension?
A Yes. A request for an extension must be made at least 30 days before the Order of Conditions expires. The agency which issued the final Order (the Conservation Commission or DEP) may extend it for one year at a time.

37
Q After the applicant completes the project, do they need to do anything else?
A Upon completion of the project, the applicant must obtain a Certificate of Compliance from the agency that issued the Order. The Certificate of Compliance must be recorded at the Registry of Deeds in the county where the property is located.

38
Q Are there any penalties for violating the Wetlands Protection Act?
A Yes. A criminal action may be sought in the local district court by any officer having police powers, by any 10 citizens or by a Conservation Commission. The Act provides for penalties upon conviction including fines of not more than $25,000 or imprisonment for not more than two years, or both such fine and imprisonment; or shall be subject to a civil penalty not to exceed $25,000 for each violation. Each day a violation continues constitutes a separate offense.

39
Q What other action may be taken if work in wetlands has been done unlawfully?
A In addition to stopping work in violation of the Act, the Conservation Commission, DEP, or the courts may order the landowner to correct the work which has been completed, even if it means putting the land back into its former condition. Such work can be expensive.

THE WETLANDS CONSERVANCY PROGRAM

The Wetlands Conservancy Program's mapping component began in 1990 to acquire aerial photography for the photointerpretation and mapping of Massachusetts wetlands resources. Two distinctly different types of photography are used to produce the Program's wetlands maps:

1. color infrared photographs (CIRs) at the 1"=1,000' scale are captured in early spring when the leaves still are off the trees. This photography provides a view of the ground's surface that allows for very accurate recognition of wetlands resource areas; and

2. black-and-white orthophoto maps at the 1"=417' scale are taken in early spring. This larger-scale map serves as a basemap upon which the wetlands data from the CIR are displayed more effectively.

These mapping products are developed initially for resource analysis and policy decision-making on the state level. Since this natural resource information is so valuable at the local level as well, the Program gives a set of the maps free to the community's Conservation Commission.

The photointerpreted wetlands delineations on these maps do not substitute for a field delineation under the Wetlands Protection Act, MGL c.131, §40. However, they still provide vital resource planning and protection information to communities.

The regulatory component of the Wetlands Conservancy Program administers restriction orders placed on selected wetlands under the authority of the Inland and Coastal Wetlands Restriction Acts (MGL c.131, §40A, and MGL c.130, §105). The regulations for this aspect of the Conservancy Program are found at 302 CMR 6.00 (inland) and 302 CMR 4.00 (coastal).

Using a permanent restriction order, the Restriction Acts prohibit dredging, filling, removing, or otherwise altering or polluting selected wetland resource areas usually in advance of any work being proposed in them. The order is recorded at the Registry of Deeds in the county where the property is located to give notice of the restriction to any future purchasers. The regulation of wetlands areas is uniform within the town; the restriction orders do not vary with each landowner or by resource area.

Several questions and answers follow which will provide more information about the operation of the Wetlands Conservancy Program.

1

Q What is the purpose of the Wetlands Conservancy Program's mapping?

A The mapping is used to provide needed information about Massachusetts wetlands resources. This information is used for resource analysis and guides policy decision-making on various DEP levels. Moreover, the Program shares this valuable information by giving a set of the maps to the community free of charge.

2

Q Have all the towns in Massachusetts been mapped?

A To date, maps are available for the Metro Boston and Buzzards Bay regions. Photography has been taken for the North Shore and Merrimack River Valley areas. Photography is proposed for the Metropolitan District Commission watershed areas at the Ware River and the Quabbin, Wachusett,

and Sudbury Reservoirs.

3
Q What are the purposes of the Inland and Coastal Wetlands Restriction Acts?
A These Acts promote public safety, health, and welfare and protect public and private property, wildlife, water supplies, and fisheries by limiting activities that are likely to harm wetlands functions.

4
Q Do the Restriction Acts protect the same interests as the Wetlands Protection Act?
A Although the protected interests are worded somewhat differently in each statute, these laws are designed to preserve the same kinds of natural resources.

5
Q Do all towns in Massachusetts have restriction orders?
A No. Priority has been given to certain watersheds, shorelines, and environmentally sensitive areas. The Program concentrated its efforts in eastern Massachusetts. To date, over 50 Massachusetts communities have either coastal or inland restriction orders or both. Over 54,000 acres of wetlands are covered by restriction orders.

6
Q Are all wetlands in a community with restriction orders so restricted?
A No. The orders specifically note which wetlands they cover. All wetlands - whether they are restricted or not - remain subject to the Wetlands Protection Act.

7
Q What activities and uses are allowed by restriction orders?
A Subject to final approval by regulatory agencies such as the local Conservation Commission, some of the allowed activities and uses would include: harvesting of shellfish; outdoor recreational use; installation of floats; piers, wharves, and docks on pilings; wildlife management projects; beach nourishment; maintenance dredging; maintenance of existing structures; construction of roads to inaccessible lands; scientific projects; and installation of utilities.

8
Q What activities and uses are prohibited by the restriction orders?
A Any alteration involving removing, dredging, or filling of restricted wetlands are prohibited. This includes projects which would change existing patterns of tidal flow, obstruct the movement of sediment, or destroy the wetlands vegetation.

9
Q How does the order work?
A Landowners proposing to work in a wetlands resource area already need to file a Notice of Intent (NOI) under the Wetlands Protection Act. Landowners with restriction orders on their wetlands should check the appropriate box on the NOI form. A copy of the NOI then is forwarded to DEP's Boston office where it is reviewed. Conservation Commissions check their copy of the plans with restricted wetlands on them

to verify that the landowner has correctly filled out the restriction order question. Wetlands Protection Act regulations require that Orders of Conditions must not violate restriction orders.

10
Q Does a restriction order affect ownership of the land?
A The restriction order does not change ownership of the land and no one is given the right to trespass on private property.

11
Q Does the restriction order affect the landowner's entire property?
A The restriction pertains only to that portion of the property that is delineated on the recorded plan filed in the Registry of Deeds.

12
Q If the property is damaged or destroyed accidentally, can it be rebuilt under the restriction order?
A The restriction orders do not prevent rebuilding within the original dimensions, including such activities as reconstruction of roads, buildings, and utilities. In order to do such work, however, the landowner must file under the Wetlands Protection Act. Projects will be evaluated on a case-by-case basis.

13
Q How are restriction orders enforced?
A Violations of the orders could be violations of the Wetlands Protection Act. Such violations could be enforced by a Conservation Commission or DEP.

THE WATERWAYS REGULATION PROGRAM

The Waterways Regulation Program implements Chapter 91 of the Massachusetts General Laws. Chapter 91 protects the public's rights to public access, fishing, fowling, and navigation in tidelands, former tidelands, great ponds, rivers, and streams by regulating activities in them, such as construction, dredging, and filling.

Like the Wetlands Protection Program, the Waterways Regulation Program regulates activities through a review process triggered by an application. The Program issues licenses and permits for projects which involve dredging, the placement of structures and fill, and changes in the use of or structural alterations to existing licensed structures and fill. The individual project is reviewed to determine its impact on the public interests and to ensure that those interests are adequately protected. Chapter 91 authorizations are issued directly by DEP. However, for projects located in Commonwealth tidelands or great ponds, the Governor will review and approve the license prior to issuance by DEP.

The review process ensures that both proposed and existing (but unlicensed) projects:

-- do not interfere unreasonably with navigation;
-- are structurally sound;
-- provide proper public purposes;
-- do not significantly interfere with public rights or the rights of adjacent waterfront property owners;
-- will not adversely affect natural resources; and
-- preserve Designated Port Areas for maritime industrial use.

Maintenance, repair, and minor modifications of existing licensed projects may be exempt from licensing if the provisions of 310 CMR 9.22 are met. Only those types of maintenance described in 310 CMR 9.22 do not need prior DEP approval.

Areas Subject to Chapter 91

Coastal

Tidelands includes all present and former submerged land seaward of the historic mean high water mark out to the three mile limit of the Commonwealth's jurisdiction.

The land between the mean high water mark and the mean low water mark (or 1,650 feet seaward of the mean high water mark, whichever is less) is private tidelands. The land seaward of the low water mark out to the three-mile limit is Commonwealth tidelands.

Chapter 91 regulates specific activities in private and Commonwealth tidelands. Ch. 91 also regulates activities in parts of former tidelands: the farther from the water of filled tidelands between the first public way and the shore or the filled tidelands between 250 feet and the shore. However, Ch. 91 has jurisdiction over all filled tidelands in "Designated Port Areas" established for maritime commerce.

Inland

Inland areas subject to Chapter 91 regulation include great ponds with a water surface area of 10 acres or more in their natural (historic) state, the Connecticut River, the Merrimack River, and portions of the Westfield River.

Licenses are required for projects affecting navigation in most other non-tidal rivers and streams. Projects on non-tidal rivers and streams (except those rivers noted above), which do not reduce the space available for navigation, and which have obtained a final Order of Conditions under the Wetlands Protection Act, do not need a Ch. 91 waterways license.

All public rights found in tidelands are protected in tidal portions of rivers and streams. But in the non-tidal portions of rivers and streams, which are generally in private ownership, only the public right to navigation is protected.

The Colonial Ordinances of 1641 to 1647 reserved all land under great ponds for the benefit of the public (with the exception of great ponds acquired by private owners before 1640).

1

Q What is the purpose of Massachusetts General Laws Chapter 91?

A The purpose of Chapter 91 is to preserve, protect, and promote the public's property rights and exercise certain regulatory controls in the Commonwealth's tidelands, former tidelands, great ponds (lakes), rivers, and streams.

2

Q What public rights does Ch. 91 protect?

A In private tidelands, Ch. 91 protects the public rights to lateral access for fishing (including shellfish gathering), fowling (hunting waterfowl where permitted by law), and navigation (including access for watercraft). In non-tidal rivers and streams, Ch. 91 protects navigation. In areas owned by the Commonwealth (tidelands below low water and great ponds), Ch. 91 promotes water-dependent uses such as maritime commerce and transportation, fishing and shellfishing, recreational boating and swimming, and other activities which enable the public to enjoy the waterfront.

3

Q How does Ch. 91 protect public interests?

A The law authorizes DEP to issue licenses or permits for projects in regulated areas that involve dredging, the placement of structures and fill, and changes in the use or structural alteration of existing licensed structures and fill. In general, the Ch. 91 review process ensures that projects:

-- do not interfere unreasonably with navigation;
-- are structurally sound;
-- provide proper public purposes;
-- do not significantly interfere with public rights;
-- do not significantly interfere with the rights of adjacent waterfront property owners;
-- will not adversely affect natural resources such as fish runs, beaches, shellfish beds and spawning areas; and
-- preserve Designated Port Areas for maritime industrial use.

4
Q What kinds of lands are affected by Chapter 91?
A The following areas are subject to Chapter 91:

(a) Private tidelands;
(b) Commonwealth tidelands;
(c) the farther from the water of:
a. filled tidelands between the first public way and the shore, or
b. filled tidelands between 250 feet and the shore;
(d) the Connecticut River, the Merrimack River, and portions of the Westfield River;
(e) Great ponds - ponds and lakes which in their natural (historic) state contain 10 or more acres of surface area.

5
Q Does DEP regulate projects in filled tidelands?
A Ch. 91's jurisdiction in filled tidelands is limited to filled lands between the first public roadway and the shore or 250 feet and the shore, whichever is farther from the water. However, in Designated Port Areas, Ch. 91 has jurisdiction over all filled tidelands. The regulations exempt from licensing "landlocked" tidelands which no longer have any functional connection to the water.

6
Q What types of projects or activities require a Chapter 91 license or permit?
A Projects that propose to dredge, fill, and/or build in the regulated areas described above require a license or permit. Fill and structures which were not properly authorized under Ch. 91 in the past are subject to licensing requirements. Any structural alterations or changes in use from what was previously authorized requires a new license.

Examples of activities which require Ch. 91 authorization are piers, wharves, retaining walls, fill, dredging, culverts, dams, bridges, and buildings.

7
Q Do temporary rafts and floats require a Chapter 91 license?
A If floats and moorings are bottom-anchored and have received an annual permit from the local harbormaster (or other authorized local official), then a Ch. 91 license is not needed.

8.
Q What types of Ch. 91 authorizations can someone apply for?
A There are several types of authorizations available from DEP: -- waterways license; all projects subject to Ch. 91 jurisdiction must seek a standard waterways license, unless they are eligible for any of the other authorizations; However, certain existing unlicensed structures may be eligible for interim approvals if applications have been submitted between October 1990 and October 4, 1993;
-- waterways permit; projects not involving work on fill or structures may apply for a waterways permit for the following activities: beach nourishment, dredging, disposal involving subaqueous placement of unconsolidated material below the low water mark, burning of rubbish or other material upon the water (in accordance regulations), and lowering of water level in Great Ponds (with exceptions);
-- license or permit amendment; an applicant may amend a valid

waterways license or permit in order to renew the license term, delineate a reconfiguration zone within a marina, or to authorize a structural alteration or change not defined as substantial;

9

Q What will DEP do about projects which did not receive a valid permit or license in the past?

A The most recent DEP regulations grant a three-year amnesty (until October 4, 1993) for individuals who have been using public lands or interfering with public water-related rights without a proper license, so long as the unlicensed structure or activity has been in use since 1983. During this amnesty period, waterfront property owners may apply for an amnesty license without being fined or penalized. Interim approvals are available for piers, seawalls, bulkheads, or other small-scale water dependent structure built prior to 1984 that is accessory to a single family residence. The interim approval is valid for 30 years or until the property is sold.

10

Q What is involved in the Ch. 91 application process?

A The applicant should submit a completed application form, obtainable from DEP, which includes a properly drawn plan of work stamped and signed by a professional engineer or land surveyor registered in Massachusetts. (Applicants requesting an amnesty interim approval do not need to have their plans certified by a professional engineer or land surveyor if the fill or structure is accurately drawn by the applicant.)

11

Q After the applicant submits their application and plans, what is the next step?

A DEP determines if the proposed use is water-dependent or nonwater-dependent and issues a "Notice of Waterways License Application" to the applicant. This is a public notice, and it is the applicant's responsibility to have it published in a local newspaper. Following publication, there is a statutory 45-day comment period for public and local government review of the project.

12

Q What are water-dependent uses of tidelands?

A They are uses which require direct access to or location in the water. Examples include marinas, private piers, commercial fishing facilities, and water transportation terminals.

13

Q Are water-dependent projects given special consideration?

A DEP will license water-dependent projects under streamlined procedures, as long as they don't significantly interfere with navigation, fishing, the aquatic environment, and other water-related public rights.

14

Q What are nonwater-dependent uses?

A They are uses which do not require access to the water and may be located upland. Examples are hotels, office buildings and residences.

15

Q Are non water-dependent uses reviewed differently than water-dependent uses?

A Nonwater-dependent uses are subject to greater review and regulatory requirements. If the project proposes a nonwater-dependent use

of tidelands, a public hearing must be held in the affected city or town. DEP must determine that non water-dependent projects have a proper public purpose, provide greater benefit than detriment to the public rights in waterways, and are consistent with Coastal Zone Management policies. Non water dependent projects also may not dislocate existing water-dependent uses and must devote a reasonable portion of the project site to water-dependent public use, including public access. Ch. 91 regulations also require certain building specifications for non water dependent uses.

16

Q Are public hearings held on projects proposing water-dependent uses?

A If requested by the affected municipality, a public hearing will be held. One also may be held at the discretion of DEP.

17

Q What else does the applicant need to submit before they can receive a license?

A The applicant should submit verification that the project complies with the Wetlands Protection Act and certification from the municipal clerk that the project is in compliance with all local zoning ordinances and bylaws.

18

Q How does DEP decide whether or not to issue a license for a project?

A DEP reviews each project to determine that it:
-- does not interfere unreasonably with navigation;
-- is structurally sound;
-- has proper public purpose;
-- does not significantly interfere with public rights;
-- does not significantly interfere with the rights of adjacent waterfront property owners;
-- will not adversely affect natural resources; and
-- preserves Designated Port Areas for maritime industrial use.

In reviewing projects, DEP takes into account that the public benefits of certain water-dependent uses may create some unavoidable interference with certain water-related public rights. Such interference may be allowed if mitigation is provided to the greatest extent deemed reasonable by DEP. In the Commonwealth tidelands and for non water-dependent projects in private tidelands, the project also must be consistent with Massachusetts Coastal Zone Management policies.

19

Q Is there anyone else to notify?

A DEP notifies state and local officials, including the Conservation Commission, that a license application has been received.

20

Q Are there any charges associated with the Chapter 91 waterways license?

A Tidewater Displacement fees and Occupation fees are required for activities in, on, or over land the title to which is held by the Commonwealth. These fees vary according to the amount of tidewater displaced and the amount of Commonwealth tidelands occupied by the project. These charges are determined by DEP.

21

Q Can the applicant begin work after a Chapter 91 waterways license has been issued?

A The applicant must record the license, along with the plan as approved, at

the Registry of Deeds. Work on the project cannot begin until the license and plan have been recorded and DEP has received notification of the recording. If the license is not recorded within 60 days of issuance, it is void.

22

Q How much time does the applicant have to complete the project?

A The applicant has five years to complete the project unless otherwise stated in the license or permit. If it is not completed within the prescribed time, only the completed portion of the project will be considered licensed. The uncompleted portion will require a new application for a license before work is done. If no work is completed, the license is void.

23

Q After the project is completed, does the applicant need to do anything further?

A Within six months after project completion, the applicant must obtain a Certificate of Compliance from DEP. The applicant's request for a Certificate must be accompanied by a statement from a registered professional engineer or registered land surveyor that the project was completed according to licensed plans.

24

Q What if the applicant doesn't follow the terms and conditions of the license or fails to obtain a license?

A Any unauthorized substantial change in use or any substantial structural alteration will render the license void and it will be revoked. An unlicensed structure is a public nuisance and the Attorney General or District Attorney may institute proceedings in Superior Court to have it removed at the applicant's expense. An injunction also may be obtained ordering the applicant to correct any noncomplying portions of the project or ordering the applicant to stop work.

25

Q Can the applicant appeal DEP's license decision?

A Adjudicatory hearings by the DEP Office of General Counsel are a matter of right for public agencies, applicants who have demonstrated property rights in the lands in question, or certain "intervenors" (as described in the regulations). The outcome of the adjudicatory hearing may be appealed to the Superior Court.

DIVISION SUPPORT UNITS

The Technical Support Unit

The Technical Support Unit analyzes and presents scientific information to support Division activities, including regulatory and enforcement actions; coordination of inter- and intra-division technical issues; policy and technical guidance development; and project development.

The Unit coordinates and supports the Division's information management needs and integrates them with information management programs at the Division, Bureau, and Agency levels, such as MASSGIS, the Wetlands Information System (WETINFO), and the Waterways Information System (WATINFO).

The Unit also provides critical review and selection of current scientific literature for distribution to Division staff, municipal officials, and the general public.

The Education and Training Unit

The Division's Education and Training Unit provides internal and external outreach. Activities include:

-- staff training to enhance permitting and policy making capabilities;

-- external training to conservation commissions, as well as other municipal officials for consistent administration of state and local environmental regulations;

-- external training for professional associations and non-profit organizations to ensure greater outreach for the protection of wetland and waterways resources; and

-- development and distribution of the Division's publications and technical assistance materials. Inquiries regarding information and training materials available to the public should be directed to the Division's Chief of Education & Training at 617/292-5695.

The Program Coordination Unit

The Program Coordination Unit coordinates matters which involve more than one of the Division's three programs, including the Division's Massachusetts Environmental Policy Act (MEPA) comments, divisional compliance and enforcement strategy, cross-programmatic permit review, cross-programmatic policies and procedures and administrative matters. This Unit also provides Division input to other governmental agencies, including the Legislature.

RELATED FEDERAL, STATE, AND LOCAL PROGRAMS

This booklet has presented a summary of three key state programs which regulate wetlands, floodplains, and waterways in the Commonwealth. While these programs are central to the Commonwealth's efforts to preserve its natural resources, other programs administered under different local, state, and federal laws also deal with these resources. This section outlines some of these programs and describes how they relate to the regulatory processes for wetlands and waterways which already has been presented.

Federal Programs

Two federal agencies concerned with wetlands, floodplains, or waterways regulation are the U.S. Army Corps of Engineers (Army Corps) and the Federal Emergency Management Agency (FEMA). The Army Corps has regulatory responsibility over navigable waterways and wetlands in the United States and administers programs pursuant to the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. FEMA administers the federal Flood Insurance Program.

The Rivers and Harbors Act of 1899 was enacted to prevent obstruction of, and impediments to, navigation. Currently, the Act prohibits discharges of refuse matter into navigable waters. This law also regulates dam and dike construction and establishes harbor lines. The jurisdiction of the Rivers and Harbors Act extends to navigable waters of the United States, including all waters which now are or once were used for interstate or international commerce.

Section 404 of the Clean Water Act authorizes the Army Corps to issue permits for the discharge of dredged or fill material into the navigable waters of the United States. There are three classes of permits issued: nationwide, general, and individual. Jurisdiction under this law extends to lakes, rivers, streams, wetlands, mudflats, and sandflats of which the use, degradation, or destruction could affect interstate or foreign commerce. This includes the use by interstate travelers for recreation as well as the harvesting of fish or shellfish which could be sold in interstate commerce.

The National Flood Insurance Program administered by FEMA provides subsidized flood insurance to qualified landowners in participating communities. The law also regulates development in flood-prone areas in order to protect public safety. In order to participate a community must adopt and enforce minimum floodplain management standards in accordance with FEMA regulations and guidelines. The requirements of the program are implemented almost entirely by local government, primarily by the adoption of local zoning ordinances and bylaws. Compliance with the Wetlands Protection Act and Section 744 of the State Building Code generally satisfies FEMA requirements. New construction or substantial improvements within the 100-year floodplain must comply with FEMA standards.

Other State Programs

Some activities proposed in wetlands and waterways may require a Water Quality Certification from DEP. The issuance of these certificates is authorized by the Section 401 of the federal Clean Water Act and Massachusetts regulations 314 CMR 9.00 and 314 CMR 4.00 (water quality standards). The Water Quality Certification Program reviews projects that propose to place

fill in wetlands and/or dredge coastal and some inland waters. The Program's review ensures that water quality standards are not violated and that impacts to surface waters and wetlands are minimized. Certificates are issued for work in wetlands after a final Order of Conditions has been given by the Conservation Commission or by DEP on appeal. Plans are underway to transfer administration of the Water Quality Certification Program from DEP's Division of Water Pollution Control to the Division of Wetlands and Waterways in the early part of fiscal year 1993.

The office of Coastal Zone Management (MCZM) is a policy and planning agency within the Executive Office of Environmental Affairs. Its jurisdiction extends seaward from the coastline out to three miles and landward to 100 feet inland of specified roads and rail lines; it includes all of Cape Cod, Martha's Vineyard, and Nantucket. Coastal Zone Management policies are implemented by the DEP, the Metropolitan District Commission, the Department of Environmental Management, the Department of Food and Agriculture, and the Department of Fisheries, Wildlife and Environmental Law Enforcement. The MCZM office also ensures that federal activities (including the issuance of permits which directly affect the Massachusetts coastline) are consistent with the state's Coastal Zone Management program and policies.

The Massachusetts Environmental Policy Act (Massachusetts General Laws, Chapter 30, Sec. 61 and 62), or MEPA, is administered by the MEPA unit within the Executive Office of Environmental Affairs. The MEPA program is an environmental planning program for state projects or those requiring state approvals or permits. The program seeks to both evaluate and minimize environmental impacts of projects (including impacts on wetlands and waterways) by requiring analysis of project proposals and their alternatives in a document known as an Environmental Impact Report. There are various types and sizes of projects which are categorically included or excluded from jurisdiction under this Act and the MEPA unit should be consulted to determine if jurisdiction exists. State agencies cannot take action to grant permits on projects which are subject to MEPA until MEPA approval has been given.

Other state laws that relate to wetlands or waterways include:

-- The Massachusetts Clean Waters Act (administered by the National Pollution Discharge Elimination System (NPDES) permit program), c.21, §43;
-- Water Quality Standards, Segment Classification, c.21, §27;
-- Ocean Sanctuaries Act, c.132A, §13-16, 18;
-- Areas of Critical Environmental Concern, c.21A, §2(7); and
-- Scenic and Recreational Rivers, c.21, §17A.

Local Programs

Local Conservation Commissions have been established under the Conservation Commission Act (MGL c.40, §8c). While their functions under the state's Wetlands Protection Act already have been discussed, Commissions also serve in an advisory capacity to build awareness of environmental issues affecting a community. The Commissions participate in planning activities with other local boards to assist in natural resource protection. They are responsible for local qualification for Self Help Funds, state land acquisition funds available to help meet open space needs. Commissions also administer conservation easements and restrictions and are responsible for local participation in the Agricultural Preservation Restriction Program.

Some communities have adopted bylaws regulating wetlands, floodplains, and waterways. These local programs can include wetland zoning bylaws as well as

non-zoning bylaws. In a community with a non-zoning bylaw, permits from the local authority administering the program must be obtained in addition to any state and federal permits required.

Summary

The regulation of activities in the Commonwealth's wetlands and waterways involves federal, state, and local agencies. The primary state agency for administering wetlands and waterways regulation is DEP and its Division of Wetlands and Waterways. Other agencies are the U.S. Army Corps of Engineers, the Federal Emergency Management Agency, the Office of Coastal Zone Management, and local Conservation Commissions. Project proponents must consider the jurisdiction of all these agencies when proposing a project that may affect wetlands or waterways in Massachusetts.

ADDRESSES AND CONTACTS

The following is a list of government agencies, publications, and individuals to contact for more information about the protection and regulation of wetlands, floodplains, and waterways in Massachusetts.

Local:

Contact the Conservation Commission in your community. Commissions are volunteer boards, so many commissioners are not available during business hours. Some communities have staff on a full-time or part-time basis to provide assistance to landowners. Contact your local government offices to reach the Conservation Commission in your community.

Massachusetts Association of Conservation Commissions 10 Juniper Road Belmont, MA 02178	617/489-3930

State:

Executive Office of Environmental Affairs	617/727-9800
MA Environmental Impact Review (MEPA)	617/727-5830
Coastal Zone Management	617/727-9530
Department of Environmental Protection	617/292-5500
Regional Offices/Wetlands Division:	
Northeast - Woburn	617/935-2160
Southeast - Lakeville	508/946-2800
Central - Worcester	508/792-7650
Western - Springfield	413/784-1100
Division of Wetlands and Waterways	617/292-5695
Division of Water Pollution Control	617/292-5673
Division of Hazardous Waste	617/292-5853
Division of Water Supply	617/292-5770

Division of Air Quality Control	617/292-5630
Environmental Analysis Lawrence Experiment Laboratory	508/682-5237
State House Bookstore (copies of regulations)	617/727-2834

Federal:

New England Division U.S. Army Corps of Engineers 424 Trapelo Road Waltham, MA 02254-9149	617/647-8220
Federal Emergency Management Agency Natural and Technological Hazards Division Room 422 J.W. McCormack POCH Building Boston, MA 02109	617/223-9561

Other Information and Services

Flood Insurance Maps Massachusetts Department of Environmental Management Division of Water Resources Flood Management Program 100 Cambridge Street Boston, MA 02202	617/727-3268
Technical Assistance Massachusetts Coastal Zone Management Office 100 Cambridge Street Boston, MA 02202	617/727-9530
MCZM Southeast Regional Office	508/748-3600
MCZM South Shore Office	617/659-4692
MCZM North Shore Office	508/281-3972
MCZM Cape Cod Office	508/362-3828
State Building Code Chief of Inspection Department of Public Safety 1 Ashburton Place Boston, MA 02108	617/727-7551
Land Acquisition Massachusetts Conservation Services 100 Cambridge Street Boston, MA 02202	617/727-1552